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18 UNITED STATES BANKRUPTCY COURT
19 WESTERN DISTRICT OF WASHINGTON
20 AT SEATTLE
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22
23 In re

24 NATURAL MOLECULAR TESTING
25 CORPORATION,
26

27 Debtor.
28
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30
31

Case No. 13-19298-MLB

ORDER GRANTING SALE OF ASSETS
OUTSIDE THE ORDINARY COURSE OF
BUSINESS (YOURCODE)

32
33 THIS MATTER came before the Court upon the motion of the Chapter 11 Trustee
34 Mark Calvert for an Order Pursuant 11 USC §363 and Bankruptcy Rule 6004 Authorizing
35 and Approving the Sale of the Debtor's Assets Outside of the Ordinary Course of Business
36 for Approval of the Sale of Assets outside the Ordinary Course of Business (the "Sale
37 Motion"). The Court has reviewed the Sale Motion, the Declaration of Mark Calvert in
38 Support of Motion for Sale of Assets, the United States' Objection to the Sale Motion, the
39 Committee's Opposition to the Sale Motion, the Declaration of Christopher M. Alston in
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ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 1

115286-0001/LEGAL124444853.3

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 Support of the Committee's Opposition to the Sale Motion, the Purchaser's Modification of
2 Term Sheet (the "Modification"), the Trustee's Update Regarding the Sale Motion, the
3 Committee's Supplemental Response in Support of Opposition to the Sale Motion, the
4 Supplemental Declaration of Mark Calvert in Support of Motion for Sale of Assets, United
5 States' Supplemental Response in Support of Opposition to the Trustee's Motion for an
6 Order Authorizing and Approving the Sale of Debtor's Assets Outside of the Ordinary
7 Course of Business, the Trustee's Submission of Asset Purchase Agreement, the Declaration
8 and Supplemental Declaration of Beau Fessenden, Committee's Second Supplemental
9 Response in Support of Opposition to Trustee's Motion for Order Authorizing and
10 Approving Sale of Debtor's Assets, United States' Second Supplemental Response in
11 Support of Opposition to the Trustee's Motion for an Order Approving the Sale of the
12 Debtor's Assets Outside of the Ordinary Course of Business, and the Trustee's Reply in
13 Support of Motion for an Order Pursuant to U.S.C. §363 and Bankruptcy Rule 6004
14 Authorizing and Approving the Sale of the Debtor's Assets Outside of the Ordinary Course
15 of Business, and has heard the argument of counsel on the record. All capitalized terms not
16 otherwise defined herein shall have the meaning set forth in the Asset Purchase Agreement
17 submitted by the Trustee on January 20, 2015, as may be amended by this Order (the
18 "APA")
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36 **THE COURT HERBY FINDS AS FOLLOWS:**
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38 A. The findings and conclusions set forth herein constitute this Court's
39 findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable
40 to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following
41 findings of fact constitute conclusions of law, they are adopted as such. To the extent any of
42 the following conclusions of law constitute findings of fact, they are adopted as such.
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ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 2

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 B. This Court has jurisdiction over the Sale Motion and the Sale
2
3 Transaction pursuant to 28 U.S.C. §§ 157 and 1334, and this matter is a core proceeding
4
5 pursuant to 28 U.S.C. § 157(b)(2)(A), (M) and (O). Venue in this district is proper under 28
6
7 U.S.C. §§ 1408 and 1409.

8
9 C. The statutory predicates for the relief requested in the Sale Motion are
10
11 Bankruptcy Code Sections 105 and 363 and Bankruptcy Rules 2002, 6004 and 9014.

12
13 D. Proper, timely, adequate, and sufficient notice of the Sale Motion
14
15 have been provided by the Debtor in accordance with Sections 102(1) and 363(b) of the
16
17 Bankruptcy Code, Bankruptcy Rules 2002, 6004, 9006, 9007, and 9014, the Local
18
19 Bankruptcy Rules for the Western District of Washington. Such notice was good and
20
21 sufficient and appropriate under the circumstances of this case. No other or further notice of
22
23 the Sale Motion or of the entry of this Order is necessary or shall be required. A reasonable
24
25 opportunity to object or be heard regarding the requested relief has been afforded to all
26
27 interested persons and entities.

28
29 E. The Sale Motion sought to sell substantially all of the Debtor's
30
31 operating assets to YOURCODE, INC. ("Purchaser"). One of the conditions precedent to
32
33 such sale was the Purchaser negotiating a new lease with the Debtor's landlord. The
34
35 Purchaser was unsuccessful in doing so. The Purchaser filed its Modification on
36
37 December 16, 2014, indicating that Purchaser was only interested in purchasing certain
38
39 intellectual property assets and a GMC Sierra truck.

40
41 F. The Trustee filed an Update Regarding the Sale Motion on
42
43 December 17, 2014 indicating that the Trustee agreed to sell the Debtor's intellectual
44
45 property assets to Purchaser pursuant to the terms set forth in the Modification filed by
46
47

ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 3

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Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 Purchaser. At a hearing on December 19, 2014, the Court continued the hearing to
2
3 January 16, 2015 and set intermediate deadlines.

4
5 G. On January 2, 2015, the Trustee filed a Submission of Asset Purchase
6
7 Agreement, reflecting the terms under which Purchaser agreed to purchase specified assets
8
9 from the Trustee.

10
11 H. The Court conditionally approved the sale pursuant to that Asset
12
13 Purchase Agreement, subject to further revisions, on January 16, 2015. The Trustee now
14
15 requests approval of the Asset Purchase Agreement in substantially the form attached hereto
16
17 as Exhibit A. (the “APA”).

18
19 I. The Assigned Assets to be transferred pursuant to the APA (the
20
21 “Assets”) constitute property of the Debtor’s estate and title thereto is vested in the Debtor’s
22
23 estate within the meaning of § 541(a) of the Bankruptcy Code.

24
25 J. The Trustee has demonstrated a sufficient basis and compelling
26
27 circumstances for it to sell the Assets under Section 363 of the Bankruptcy Code, and such
28
29 action is an appropriate exercise of the Trustee’s business judgment and in the best interests
30
31 of the Debtor, the estate and the creditors. Such business reasons include, but are not limited
32
33 to, the facts that (i) there is substantial risk of deterioration of the value of the Assets if the
34
35 Sale is not consummated quickly; (ii) the APA constitutes the highest or best offer for the
36
37 Assets; (iii) and unless the Sale is concluded as provided for in the Sale Motion and pursuant
38
39 to the APA, potential creditor recoveries may be substantially diminished.

40
41 K. The Trustee marketed the Assets and conducted the marketing and
42
43 sale process as set forth in the Sale Motion.

44
45 L. The Sale transaction has been negotiated by the Trustee and the
46
47 Purchaser in good faith, at arms’ length and without collusion. The terms and conditions of

ORDER GRANTING TRUSTEE’S MOTION FOR
SALE OF ASSETS – 4

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 the APA, including the total consideration to be realized by the Debtor's estate pursuant to
2 the APA, are fair and reasonable, and the Sale transaction is in the best interest of the
3 Debtor, its creditors and its estate.
4

5
6 M. The Trustee and the Purchaser have not engaged in any conduct that
7 would cause or permit the APA or the consummation of the Sale transactions to be avoided,
8 or costs or damages to be imposed, under Section 363(n) of the Bankruptcy Code.
9

10
11 N. Sufficient evidence has been provided that the Purchaser is acting in
12 good faith pursuant to Section 363(m) of the Bankruptcy Code in consummating the Sale
13 transaction.
14

15
16 O. The Purchaser is therefore a "good faith purchaser" entitled to the full
17 benefits and protections of Section 363(m) of the Bankruptcy Code with respect to the
18 purchase and sale of the Assets.
19

20
21 P. The sale of the Assets to the Purchaser will be, as of the Closing, a
22 legal, valid and effective transfer of such Assets, and will vest the Purchaser with all right,
23 title and interest of the Debtor to the Assets free and clear of all liens (the "Liens), with such
24 Liens to attach to the consideration to be received by the Debtor in the same priority and
25 subject to the same defenses and avoidability, if any, as of the Closing. The Purchaser
26 would not acquire the Assets if the sale thereof were not free and clear of all Liens. A sale
27 of the Assets other than one free and clear of all Liens would adversely impact the Debtor's
28 estate, and would yield substantially less value for the estate, with less certainty than the
29 Sale. Therefore, the Sale is in the best interests of the Debtor, the estate and creditors, and
30 all other parties in interest.
31

32
33 Q. The Debtor may sell and assign the Assets free and clear of all Liens,
34 because, with respect to each creditor asserting a Lien, one or more of the standards set forth
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ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 5

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 in Bankruptcy Code sections 363(f)(1)-(5) has been satisfied. Those holders of Liens who
2 did not object or who withdrew their objections to the Sale are deemed to have consented to
3 the Sale of the Assets to the Purchaser pursuant to Bankruptcy Code section 363(f)(2). The
4 holders of Liens who did object, if any, fall within one or more of the other subsections of
5 Bankruptcy Code section 363(f) and are adequately protected by having their Liens, if any,
6 attach to the proceeds of the Sale ultimately attributable to the Assets in which such holders
7 allege a Lien, in the same order of priority, with the same validity, force and effect that such
8 holder had prior to the Sale, and subject to any claims and defenses the Debtor and its estate
9 may possess with respect thereto.
10

11
12 R. The Purchaser shall have no obligations with respect to any liabilities
13 of the Debtor other than those liabilities expressly assumed (the "Assumed Liabilities").
14

15 S. The Sale transaction contemplated under the APA does not amount to
16 a consolidation, merger or *de facto* merger of the Purchaser and the Debtor and/or the
17 Debtor's estate; there is not substantial continuity between the Purchaser and the Debtor,
18 there is no common identity between the Debtor and the Purchaser, there is no continuity of
19 enterprise between the Debtor and the Purchaser, and the Purchaser is not a mere
20 continuation of the Debtor or its estate. Accordingly, the Purchaser does not constitute a
21 successor to the Debtor or its estate. Other than the Assumed Liabilities, the Purchaser shall
22 have no obligations with respect to any liabilities of the Debtor.
23

24 T. The consummation of the Sale transaction is legal, valid and properly
25 authorized under all applicable provisions of the Bankruptcy Code, including without
26 limitation Bankruptcy Code §§ 105(a), 363(b), 363(f), 363(m) and all of the applicable
27 requirements of such sections have been or will be complied with in respect of the Sale as of
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ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 6

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 the Closing, including Purchaser's indication of its compliance with the privacy provisions
2 of § 363(b)(1).
3

4 U. The Sale of the Assets outside of a plan of reorganization pursuant to
5 the APA neither impermissibly restructures the rights of the Debtor's creditors nor
6
7 impermissibly dictates the terms of a liquidating plan of reorganization for the Debtor. The
8
9 Sale transaction does not constitute a *sub rosa* chapter 11 plan.
10

11 V. Time is of the essence. In order to maximize the value of the
12
13 Debtor's assets, it is essential that the Sale of the Assets occur within the time constraints set
14
15 forth in the APA. Accordingly, there is cause to lift the stay contemplated by Bankruptcy
16
17 Rule 6004(h).
18

19 W. The Sale transaction contemplated by the APA is in the best interests
20
21 of the Debtor and its estate, its creditors, interest holders and all other parties in interest
22
23 herein; and it is therefore,
24

25
26 **ORDERED, ADJUDGED AND DECREED THAT:**
27

28 1. The relief requested in the Sale Motion is GRANTED, subject to the
29
30 terms and conditions contained herein.
31

32 2. All objections and responses to the Sale Motion that have not been
33
34 overruled, withdrawn, waived, settled, continued, or resolved, and all reservations of rights
35
36 included therein, are hereby overruled and denied.
37

38 3. Notice of the Sale Hearing was fair and equitable under the
39
40 circumstances and complied in all respects with §102(1) of the Bankruptcy Code and
41
42 Bankruptcy Rules 2002, 6004 and 9014.
43

44 4. The Court's findings of fact and conclusions of law on the record are
45
46 incorporated herein by reference.
47

ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 7

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 5. The APA and the Sale are hereby approved, and the Trustee is hereby
2 authorized and empowered to enter into, and to perform its obligations under, the APA and
3
4 to execute and perform such agreements or documents, and take such other actions as are
5
6 necessary or desirable to effectuate the terms of the APA.
7

8
9 6. The Purchaser is hereby granted and is entitled to all of the
10
11 protections provided to a good faith purchaser under section 363(m) of the Bankruptcy
12
13 Code. Pursuant to section 363(m) of the Bankruptcy Code, if any or all of the provisions of
14
15 this Order are hereafter reversed, modified or vacated by a subsequent order of this
16
17 Bankruptcy Court or any other court, such reversal, modification or vacatur shall not affect
18
19 the validity and enforceability of any sale, transfer or assignment under or pursuant to the
20
21 APA, or any obligation or right granted pursuant to the terms of this Order (unless stayed
22
23 pending appeal), and notwithstanding any reversal, modification or vacatur shall be
24
25 governed in all respects by the original provisions of this Order or the APA, as the case may
26
27 be.
28

29 7. The Sale as approved by this Order is not subject to avoidance
30
31 pursuant to section 363(n) of the Bankruptcy Code.
32

33 8. The Trustee is authorized and empowered, at the Closing, to fully
34
35 perform under, consummate, and implement the terms of the APA together with any and all
36
37 additional instruments and documents that may be reasonably necessary or desirable to
38
39 implement and effectuate the terms of the APA, this Order, and the Sale, and to take all
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41 further actions as may reasonably be requested by the Purchaser for the purpose of
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43 assigning, transferring, granting, conveying and conferring to the Purchaser, or reducing to
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45 possession any or all of the Assets, as may be necessary or appropriate to the performance of
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ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 8

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 the Debtor's obligations as contemplated by the APA, without any further corporate action
2 or orders of the Bankruptcy Court.
3

4 9. The Trustee is further authorized and empowered to cause to be filed
5 with the secretary of state of any state or other applicable officials of any applicable
6 governmental units, any and all certificates, agreements, or amendments necessary or
7 appropriate to effectuate the transactions contemplated by the APA, any related agreements
8 and this Order, and all such other actions, filings, or recordings as may be required or as the
9 Trustee may determine are necessary or appropriate.
10

11 10. Effective as of the Closing: (a) except as set forth herein, the sale and
12 assignment of the Assets by the Trustee to the Purchaser shall constitute a legal, valid and
13 effective transfer of the Assets notwithstanding any requirement for approval or consent by
14 any person and vests the Purchaser with all right, title and interest of the Debtor in and to the
15 Assets, free and clear of all Liens, pursuant to section 363(f) of the Bankruptcy Code, and
16 (b) the assumption of any Assumed Liabilities by the Purchaser constitutes a legal, valid and
17 effective delegation of any Assumed Liabilities to the Purchaser and divests the Debtor and
18 its estate of all liability with respect to any Assumed Liabilities.
19

20 11. Except to the extent specifically provided in the APA, upon the
21 Closing, the Trustee shall be, and hereby is, authorized and empowered, pursuant to sections
22 105, 363(b) and 363(f) of the Bankruptcy Code, to sell and assign the Assets to the
23 Purchaser. The sale and assignment of the Assets to the Purchaser vests the Purchaser with
24 all right, title and interest of the Debtor to the Assets free and clear of any and all Liens,
25 Excluded Liabilities, and other liabilities, and whether imposed by agreement,
26 understanding, law, equity or otherwise, with all such Liens to attach only to the proceeds of
27 the Sale and assignment of the Assets with the same priority, validity, force, and effect as
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ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 9

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 they now have in or against the Assets. The Sale Motion shall be deemed to provide
2 sufficient notice as to the sale and assignment of the Assets free and clear of all Liens,
3
4 Excluded Liabilities, and other liabilities. Following the Closing, no holder of any Lien on
5
6 the Assets may interfere with the Purchaser's use and enjoyment of the Assets based on or
7
8 related to such Lien, or any actions that the Trustee or Debtor may take in this bankruptcy
9
10 case and no interested party may take any action to prevent, interfere with or otherwise
11
12 enjoin consummation of the Sale transaction.
13

14
15 12. The Purchaser has not assumed and is not otherwise obligated for any
16
17 of the Debtor's liabilities other than the Assumed Liabilities and as otherwise set forth in the
18
19 APA and this Order, and the Purchaser has not acquired any of the Excluded Assets (as
20
21 defined in the APA). Consequently, all persons and all holders of Liens or claims of any
22
23 kind, including but not limited to claims related to product liability or personal injury, based
24
25 upon or arising out of liabilities retained by the Debtor are hereby enjoined from taking any
26
27 action against the Purchaser or the Assets, including asserting any setoff, right of
28
29 subrogation or recoupment of any kind, to recover any Liens or claims of any kind including
30
31 but not limited to claims related to product liability or personal injury, or on account of any
32
33 liabilities of the Debtor other than Assumed Liabilities pursuant to the APA. All persons
34
35 holding or asserting any Lien on the Excluded Assets are hereby enjoined from asserting or
36
37 prosecuting such Liens or cause of action against the Purchaser or the Assets for any liability
38
39 associated with the Excluded Assets. All persons holding or asserting any claims against
40
41 Excluded Liabilities are hereby enjoined from asserting or prosecuting such claims or causes
42
43 of action against the Purchaser or the Assets for any liability associated with the Excluded
44
45 Liabilities.
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ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 10

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 13. The provisions of this Order authorizing the sale and assignment of
2 the Assets free and clear of Liens and the Excluded Liabilities, shall be self-executing, and
3
4 neither the Debtor nor the Purchaser shall be required to execute or file releases, termination
5
6 statements, assignments, consents, or other instruments in order to effectuate, consummate
7
8 and implement the provisions of this Order.
9

10 14. Each and every federal, state, and local governmental agency or
11
12 department is hereby authorized to accept any and all documents and instruments necessary
13
14 and appropriate to consummate the transactions contemplated by the APA and this Order.
15

16 15. All of the Debtor's interests in the Assets to be acquired by the
17
18 Purchaser under the APA shall be, as of and upon the occurrence of the Closing, transferred
19
20 to and vested in the Purchaser.
21

22 16. The Purchaser is not and shall not be deemed a "successor" to the
23
24 Debtor or its estate as a result of the consummation of the Sale contemplated by the APA or
25
26 any other event occurring in the chapter 11 case under any theory of law or equity, and the
27
28 Purchaser shall not assume, nor be deemed to assume, or in any way be responsible for any
29
30 liability or obligation of any of the Debtor and/or its estate including, but not limited to, any
31
32 bulk sales law, successor liability, liability or responsibility for any claim against the Debtor
33
34 or against an insider of the Debtor, or similar liability except as otherwise expressly
35
36 provided in the APA. The sale and assignment of the Assets or the assumption and
37
38 assignment of the Assumed Liabilities by the Purchaser and the Sale approved hereby, will
39
40 not cause the Purchaser to be deemed a successor in any respect to the Debtor.
41

42 17. This Order and the APA shall be binding upon, inure to the benefit of
43
44 and govern the acts of all persons and entities, including without limitation, the Debtor, the
45
46 Trustee and the Purchaser, their respective successors and permitted assigns, including,
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ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 11

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

1 without limitation, any trustee appointed in a chapter 7 case if this case is converted from
2 chapter 11, all creditors of the Debtor (whether known or unknown), filing agents, filing
3 officers, title agents, recording agencies, secretaries of state, and all other persons and
4 entities who may be required by operation of law, the duties of their office or contract, to
5 accept, file, register, or otherwise record or release any documents or instruments or who
6 may be required to report or insure any title in or to the Assets.
7

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12 18. The automatic stay pursuant to section 362 of the Bankruptcy Code is
13 hereby lifted, to the extent necessary, without further order of this court to allow the
14 Purchaser to deliver any notice provided for in the APA and allow the Purchaser to take any
15 and all actions permitted under the APA in accordance with the terms and conditions
16 thereof.
17

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22 19. The Court makes no findings or order with respect to the assignability
23 of any licensed intellectual property used by the Debtor that requires the consent of the
24 licensor to assign, and the rights of any such licensor remain unaffected by this Order. The
25 Purchaser shall bear all risk that any of the Assets may violate the rights of any such
26 licensor.
27

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32 20. This Bankruptcy Court shall retain exclusive jurisdiction to enforce
33 the terms and provisions of this Order and the APA in all respects and to decide any disputes
34 concerning this Order, the APA, or the rights and duties of the parties hereunder or
35 thereunder or any issues relating to the APA or this Order including, but not limited to, the
36 interpretation of the terms, conditions and provisions hereof and thereof, the status, nature
37 and extent of the Assets and all issues and disputes arising in connection with the relief
38 authorized herein, inclusive of those concerning the transfer of the assets free and clear of all
39 Liens.
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ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 12

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

// END OF ORDER //

Presented by:

PERKINS COIE LLP

By: /s/ John S. Kaplan

John S. Kaplan, WSBA No. 23788

JKaplan@perkinscoie.com

1201 Third Avenue, Suite 4900

Seattle WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

Attorneys for Trustee Mark Calvert

Approved as Form; Notice of Presentment

Waived by:

KARR TUTTLE CAMPBELL

By: _____

Diana K. Carey, WSBA No. 16239

Attorneys for YourCode, Inc.

FOSTER PEPPER PLLC

By: _____

Christopher M. Alston, WSBA No. 18823

Jane Pearson, WSBA No. 12785

Counsel for the Official Unsecured Creditors'
Committee

ANNETTE L. HAYES

ACTING UNITED STATES ATTORNEY

By: _____

Christina Fogg, WSBA No. 40159

ORDER GRANTING TRUSTEE'S MOTION FOR
SALE OF ASSETS – 13

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

EXHIBIT A
ASSET PURCHASE AGREEMENT

ORDER GRANTING TRUSTEE'S MOTION FOR
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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000